BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C., 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act;	)	**WC Docket No. 07-245**
Amendment of the Commission's Rules	)	**RM - 11293**
and Policies Governing Pole Attachments	)	**RM - 11303**
	)	
	)	

INITIAL COMMENTS OF FLORIDA POWER & LIGHT AND TAMPA ELECTRIC REGARDING ILECS AND POLE ATTACHMENT RATES

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Florida Power & Light Company ("FPL") and Tampa Electric Company ("TECO") respectfully file these initial comments to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register by the Commission on February 6, 2008, and subsequently corrected on February 12, 2008.[1]

I. INTRODUCTION

A. FPL & TECO

FPL is an investor owned electric utility headquartered in Miami, Florida. FPL's service territory contains approximately 27,650 square miles, covering the entire east coast of Florida, as well as certain parts of Florida's west coast south of Tampa.[2] FPL serves approximately 4.5 million customers in 35 counties, and owns 1.1 million distribution poles.[3] More than 760,000 (almost 67%) of these poles are impacted by third party attachments.[4]

TECO, headquartered in Tampa, Florida, has supplied the Tampa Bay area with electricity since 1899.[5] Its West Central Florida service area covers 2,000 square miles, including all of Hillsborough County and parts of Polk, Pasco and Pinellas counties.[6] TECO serves nearly 670,000 residential, commercial and industrial customers.[7] TECO has approximately 312,500 distribution poles, more than 212,000 of which are impacted by third party attachments.[8]

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[1] FPL and TECO are also parties to the contemporaneously filed "Initial Comments Regarding Safety and Reliability," filed jointly with Progress Energy Florida, Inc.

[2] *See* Declaration of Thomas J. Kennedy ¶ 2 attached as Exhibit 1 to the Initial Comments Regarding Safety and Reliability from Florida Power & Light, Tampa Electric Company, and Progress Energy Florida, Inc.

[3] *See* Kennedy Decl. at ¶ 2.

[4] *See id.*

[5] *See* Declaration of Kristina L. Angiulli ¶ 2 attached as Exhibit 2 to the Initial Comments Regarding Safety and Reliability from Florida Power & Light, Tampa Electric Company, and Progress Energy Florida, Inc.

[6] *See* Angiulli Decl. at ¶ 2.

[7] *See id.*

[8] *See id.*

B. Summary of Comments

These initial comments focus on the following issues raised in the NPRM: (1) whether the Commission should assert jurisdiction, under Section 224 of the Pole Attachment Act, over pole attachments by incumbent local exchange carriers ("ILECs") on electric utility poles; and (2) whether the Commission should adopt a single rate for pole attachments. First, even if the Commission finds that it *can* exercise jurisdiction over ILEC attachments on electric utility poles under Section 224, it should decline to exercise such jurisdiction due to the unique circumstances and history behind the relationships between electric utilities and ILECs. Second, FPL and TECO support the Commission's tentative conclusion that all attachments used to provide broadband service should be subject to the same rate, so long as it does not include ILECs and so long as the unified rate is the telecom rate with certain adjustments to the Commission's presumptions.

II. THE COMMISSION SHOULD NOT EXERCISE JURISDICTION OVER ILEC ATTACHMENTS ON ELECTRIC UTILITY POLES.

The NPRM requests comments on: (1) whether the text of Section 224 of the Pole Attachment Act clearly excludes ILECs from having regulated attachment rates; (2) whether, to the extent there is any ambiguity in the text of Section 224, Congress intended to grant ILECs regulated attachment rates; and (3) whether, even if Congress correctly excluded ILECs from having regulated attachment rates in 1996, conditions have sufficiently changed to warrant a reversal of that exclusion.[9] The short answers to these questions are yes, no, and no, respectively. The text of Section 224 *does* explicitly exclude ILECs. Congress *did* intend it that way. And nothing has changed since 1996 that would warrant a change in Congress' original intent.

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[9] *NPRM*, 22 FCC Rcd 20195, ¶ 25 (Nov. 20, 2007).

The Edison Electric Institute ("EEI") is filing comments that address the threshold question of why the Commission *cannot*, under the plain text of Section 224, exercise jurisdiction over ILEC attachments on electric utility poles. FPL and TECO support those comments and file these additional comments to show why the Commission (in the event it ignores the plain text of Section 224) *should not* assert jurisdiction over ILEC attachments on electric utility poles.

The United States Telecom Association ("USTA"), in its rulemaking petition filed on October 11, 2005, argues that ILECs should receive the same rate subsidies that competitive local exchange carriers ("CLECs") receive under Section 224. But comparing ILECs to CLECs is like comparing apples and oranges. ILECs own pole networks (which electric utilities need). CLECs do not. ILECs have decades-old relationships with electric utilities based on mutually beneficial cost sharing. CLECs have forced-placed access at subsidized rates. ILECs are defined as "utilities" and treated as pole owners under Section 224. CLECs are treated as new market entrants with a need for mandatory pole access under Section 224. The suggestion by USTA, Bellsouth, Embarq, and other ILECs that they are somehow left "holding the bag" turns a blind eye on the entire premise of joint use and disregards relationships that, in some cases, pre-date the Commission itself. Oddly enough, this is an area where the electric utilities are aligned with cable television and CLECs, albeit for very different reasons.

Taking jurisdiction over ILEC attachments would significantly disrupt contractual relationships between electric utilities and ILECs and would shift the ownership burden for joint use networks entirely to electric utilities, creating adverse financial consequences for electric utilities and their customers. Moreover, the significant variances in the different relationships between ILECs and electric utilities make these relationships particularly unsuited for uniform regulatory treatment. FPL and TECO respectfully request that the Commission decline the invitation to exercise jurisdiction over this relationship.

A. Congress Excluded ILECs for a Reason

One of the fundamentally erroneous presumptions in the NPRM is that ILECs pay "pole attachment rates" to electric utilities, as if to suggest those "rates" are functionally congruous with the "rates" paid by CLECs. But the monetary consideration exchanged by electric utilities and ILECs (if any) through joint use agreements shares little, if anything, in common with CLEC pole attachment rates. These "rates," like ILECs and CLECs in general, are apples and oranges.

The difference between ILECs and CLECs is stark. ILECs are the local telephone companies that provided (usually monopolistic) service in defined geographic areas leading up to the passage of the Telecommunications Act of 1996. They are the established, dominant telephone service providers. In fact, ILECs' significant pole ownership, their market position, and the corresponding potential for anticompetitive behavior by ILECs, were among the reasons the Pole Attachment Act defined ILECs as "utilities," not as "attachers."[10]

CLECs, on the other hand, are relatively new market entrants and they generally do not own poles. In the rare cases where CLECs do own poles, their networks are neither sophisticated nor extensive. CLECs' lack of pole ownership was the supposition behind why Congress granted CLECs attachment rights under Section 224 of the Pole Attachment Act.[11]

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[10] *See* 47 U.S.C. § 224(a)(5) ("For purposes of this section, the term 'telecommunications carrier' does not include any incumbent local exchange carrier...."); *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777, 6781 (FCC 1998) ("The 1996 Act ... specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers. Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.").

[11] *See id.*

B. The Relationships between ILECs and Electric Utilities

1. Joint Use Agreements

The NPRM seeks comments on "joint use" relationships.[12] ILECs' significant pole ownership means that ILECs and electric utilities each have something that the other needs – pole networks. Because both ILECs and electric utilities own a significant network of poles, they have historically entered into contracts – typically called "joint use agreements" – to share infrastructure costs and to reduce pass-through costs to customers.[13] Given the joint nature of these agreements, there is a level of mutuality that exists between ILECs and electric utilities that cannot, as a practical matter, exist in relationships between CLECs and electric utilities (CLECs, frankly, have nothing to offer).[14] Joint use agreements typically place no make-ready or permitting requirements on either party for normal construction needs because the pole networks are engineered and constructed with joint use in mind.[15] Perhaps most importantly, the joint use agreements give both ILECs and electric utilities responsibility for the safety and reliability of the joint use networks.[16] This creates a mutually dependent relationship that necessitates fair treatment between the parties.[17]

The purpose of joint use agreements is shared cost of infrastructure.[18] Joint use agreements are not space rental agreements, like the pole attachment agreements between electric utilities and CLECs.[19] Joint use agreements have little to do with the space actually

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12 *NPRM*, ¶ 15.

13 *See* Angiulli Decl. at ¶ 16; Kennedy Decl. at ¶ 13.

14 *See id.*

15 *See* Kennedy Decl. at ¶ 13.

16 *See* Angiulli Decl. at ¶ 16; Kennedy Decl. at ¶ 13.

17 *See id.*

18 *See* Angiulli Decl. at ¶ 16.

19 *See id.*; Kennedy Decl. at ¶ 13.

occupied on a pole by either party. Most joint use agreements are based on the concept of "parity," meaning that ILECs and electric utilities share the burden of network ownership either (a) relative to the space allocated through the joint use agreement, or (b) relative to the comparative network construction costs (or perhaps with some combination of the two serving as a benchmark for negotiated parity levels). For example, suppose contractual parity is 55/45 (electric utility owns 55%; ILEC owns 45%) in a shared network of 1,000 poles. If the electric utility owns 600 poles, and the ILEC owns 400 poles, the ILEC typically would pay an annual rate for 50 poles. This rate is often called an "adjustment rate" because it is supposed to either offset the additional annual costs of ownership borne by the party owning jointly used poles in excess of its contractual share, or encourage ownership by the party not owning its contractual share.[20]

In other joint use relationships, there might be a per pole adjustment rate paid by each party to the other that, if the parties are in parity, results in no money actually exchanging hands. In these types of relationships, the adjustment rate paid by the electric utility to the ILEC is generally higher than the rate paid by the ILEC to the electric utility (to reflect either the differences in contractually allocated space, or the differences in comparative network construction costs). Contractual parity in any given joint use agreement may vary, depending on a number of factors, including the specific business needs and objectives of each party.[21]

2. FPL's and TECO's Joint Use Agreements

FPL has joint use agreements with 6 different ILECs.[22] The major ILECs in FPL's service territory are Bellsouth Telecommunications, Inc. (d/b/a AT&T Florida, Inc.), Verizon

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20 *See* Kennedy Decl. at ¶ 14.

21 *See id.*

22 *See id.*

and Embarq.[23] FPL's current joint use agreements with all three entities date back to January 1, 1975.[24] Since that time, there have been two amendments to the Bellsouth agreement (both addressing storm restoration and hardening issues), two amendments to the Verizon agreement, and two amendments to the Embarq agreement (the last coming in 1987).[25] In the Bellsouth joint use agreement, for example, parity is 52.6% FPL and 47.4% Bellsouth. As of the last five-year audit cycle, the actual relative ownership percentages with all ILECs are 69% FPL and 31% ILEC.[26] These figures have not changed significantly since 1994.[27] Though ILEC pole ownership has declined slightly, the change has averaged less than 1/2 % per year.[28]

TECO has joint use agreements with Verizon and Embarq.[29] The agreements have been in place, virtually unchanged, since 1961 for Verizon and since 1974 for Embarq.[30] Under the agreements, both parties are required to own an equal number of jointly used poles, lest the minority pole owner pay a per pole adjustment rate to the majority pole owner.[31] The actual current relative pole ownership between TECO and Verizon is 92% and 8% respectively.[32] The actual current relative pole ownership between TECO and Embarq is 95% and 5% respectively.[33] However, these relative ownership ratios have not changed significantly since the inception of the relationships. For example, shortly before TECO and Peninsular Telephone Company (a predecessor to Verizon) executed a joint use agreement in 1936, the relative ownership was 93%

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23 *See id.*

24 *See id.*

25 *See id.*

26 *See id.*

27 *See id.* at ¶ 16.

28 *See id.*

29 *See* Angiulli Decl. at ¶ 17.

30 *See id.*

31 *See id.*

32 *See id.*

33 *See id.*

and 7%.[34] The 1961 agreement between TECO and Verizon also states that relative ownership as of January 1, 1960, was 94% TECO and 6% Verizon.[35] Verizon has actually moved closer to parity since 1961.

The reasons for any change in relative ownership have more to do with business and operational choices being made by the ILECs than any fundamental change in the relationship between ILECs and electric utilities. When new poles need to be set, ILECs generally are not "champing at the bit" to set them. To the extent the ILECs' voluntary decisions have created any changes in relative pole ownership, those changes should not constitute justification for bringing ILECs within the rate protections of Section 224.

In any event, the ILECs with whom FPL and TECO have joint use relationships have not lost any bargaining power. Even with the slight declines in relative pole ownership, ILECs still have something that FPL and TECO need – poles. FPL currently has facilities installed on 637,475 ILEC poles.[36] TECO currently has facilities installed on 13,102 ILEC poles.[37]

C. Consequences of Asserting Jurisdiction over ILEC Attachments on Electric Utility Poles

FPL's and TECO's distribution systems were constructed to accommodate joint use agreements with ILECs. Imposing a single regulated rate structure would "pull the rug" from under this foundational principle on which the joint use networks were built, would throw numerous joint use agreements into flux, and would ultimately result in the entire burden of pole infrastructure ownership resting on the shoulders of electric utilities and their customers.

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34 *See id.*

35 *See id.*

36 *See* Kennedy Decl. at ¶ 16.

37 *See* Angiulli Decl. at ¶ 17.

1. Asserting Jurisdiction Over ILECs Under Section 224 Would Have Significant Adverse Financial Impacts On Electric Utilities And Their Customers

Bringing ILECs within the Commission's jurisdiction under Section 224 would subject ILEC attachments on electric utility poles to a regulated rate, while leaving the economic considerations paid by electric utilities for attachments on ILEC poles in flux, if not in disarray. ILECs could be paying a lower, subsidized rate to attach to electric utility poles, while electric utilities may be stuck paying the higher, negotiated "adjustment rate" for their facilities on ILEC poles. This is fundamentally unfair considering that electric utilities and ILECs have a seventy-five-plus year history of operating and maintaining joint use networks on freely negotiated rates, terms, and conditions.

Furthermore, giving ILECs the benefit of a regulated rate would create a huge disincentive for ILECs to own poles. The ultimate result will be that electric utilities and their customers will bear the entire capital cost and maintenance expense of future pole plant. Why own poles when you can rent space for a fraction of the cost?

2. Imposing A Single Regulated Rate On ILEC Attachments Would Be Inherently Unreasonable Because Relationships Between ILECs And Electric Utilities Lack Uniformity

There is no uniformity in relationships between electric utilities and ILECs. Parity levels differ. Adjustment rate levels differ. Liability sharing mechanisms differ. Standard joint use poles differ. Transfer processes differ. Cost sharing for operations differ. Given this lack of uniformity, it would be inherently unreasonable to apply a single regulatory paradigm to the widely varying relationships between ILECs and electric utilities.

3. Bringing ILECs Within Section 224 Would Require Wholesale Renegotiation Of Numerous Existing Joint Use Agreements

If the Commission were to take jurisdiction over ILEC attachments on electric utility poles, all joint use agreements between ILECs and electric utilities would have to be completely renegotiated because the concept of mutuality would no longer exist between the parties.[38] ILECs would no longer be "partners" in the networks, would no longer contribute to the construction and upkeep of the networks, and would have less incentive to respect or ensure the safety and reliability of the networks. Such a fundamental change in the risks and stakes for ILECs would require renegotiation of contracts but, oddly enough, without access rights (which ILECs currently enjoy through the voluntary joint use agreements).

As the Commission recognized in the NPRM, USTA's petition for a rulemaking states that only cable television systems and "telecommunications carriers" have mandatory rights of access to poles, while all "providers of telecommunications service," including ILECs, are assured only of just and reasonable rates.[39] In other words, under the USTA's proposal, ILECs would have no mandatory access rights, meaning that electric utilities presumably could deny access to ILECs and avoid any disputes over whether their attachment rates are just and reasonable. Taken to its logical conclusion, electric utilities could remove ILECs from their pole networks entirely, which would have the exact opposite effect of the Commission's intended goal of promoting competition.[40] This reveals the absurdity of USTA's strained interpretation of Section 224, and concisely illustrates the policy reasons for *not* altering the relationships between ILECs and electric utilities.

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38 This, of course, assumes without conceding that Commission regulation would trump the existing joint use agreements.

39 *NPRM*, ¶ 24.

40 To be clear, FPL and TECO have no intentions of doing this.

D. ILECs Are Trying To Bootstrap Their Way Into The Commission's Jurisdiction

The Commission's jurisdiction over electric utility poles begins "only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.... In other words, where a utility owns or controls a pole on which there has been no designation of communications space, jurisdiction to require access will not lie."[41] Prior to the joint use agreements between electric utilities and ILECs, electric utilities had designated no communications space on their poles and the Commission would have had no nexus to exercise jurisdiction over electric utility pole networks in the first place. Now ILECs are trying to use their access under the joint use agreements (and the subsequent access stacked upon these agreements) to bootstrap themselves into the Commission's jurisdiction. This is circular reasoning at its worst, though, since but for joint use agreements, the Commission would never have been able to exercise jurisdiction over electric utility poles in the first place.

III. THE COMMISSION SHOULD ADOPT A "TWEAKED" TELECOM RATE FOR ALL CATV AND TELECOM ATTACHMENTS USED TO PROVIDE BROADBAND SERVICES.

The Commission has tentatively concluded that "all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service"[42] and "that the rate should be higher than the current cable rate, yet no greater than the telecommunications rate."[43] The NPRM further seeks comment "on the appropriate level of such

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[41] *In the Matter of Cable Info. Servs., Inc. v. Appalachian Power Co.*, 81 FCC2d 383, 391 (1980) (emphasis added); *see also In the Matter of David Bailey v. Miss. Power & Light Co.*, 1985 FCC LEXIS 2617 ("Since MPLC has designated communications space on its poles and has permitted Fayette Cable to utilize this space for CATV attachments, the necessary nexus exists for the Commission to exercise jurisdiction over MPLC's pole attachment practices."); 47 U.S.C. § 224(a) ("The term 'utility' means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.").

[42] *NPRM*, ¶ 15.

[43] *Id.*

a single rate,"[44] and "whether having two rates leads to recurring disputes over which rate to apply."[45] FPL and TECO agree that all attachments within the Commission's jurisdiction used for broadband should be subject to the same rate, and that the "single rate" should be the telecom rate with modified presumptions. Applying the telecom rate to all broadband attachments within the Commission's jurisdiction would bring virtually all CATV and CLEC attachments, which are physically identical for the most part, to the same rate. This would eliminate billing disputes, level the playing field between CATVs and CLECs, and resolve the contentious Voice Over Internet Protocol ("VOIP") debate which has mired TECO in litigation in Florida state court and the Enforcement Bureau for more than two years. FPL and TECO also support the comments submitted by EEI with respect to pole attachment rates.

A. The Commission's Authority To Adopt A Single Rate

Section 224 establishes statutory parameters for two different rates (and two rates only): one which applies to an attachment by a cable television system "used solely to provide cable services," and the other which applies to attachments by cable television systems used to provide telecom services, and telecom carriers.[46] In *NCTA v. Gulf Power*, however, the U.S. Supreme Court said: "Congress did indeed prescribe two formulas for 'just and reasonable' rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed."[47] Thus, the Commission has two options for unifying the rate all jurisdictional attachers pay for pole attachments: (1) it can exercise its regulatory discretion and classify broadband as "telecommunications" for

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44 NPRM, ¶ 31.

45 *Id.*

46 *See* Section 224 (d) & (e).

47 *Nat'l Cable & Telecommc'ns. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335 (2002).

purposes of Section 224;[48] or (2) it can exercise its "third rate" power (as referred in *NCTA v. Gulf Power)* over CATV attachments used to provide broadband, and set that "third rate" at the telecom rate (to obtain regulatory parity with telecom carriers who also provide broadband, but are subject to the telecom rate).

B. Use Of The Telecom Rate

The Commission seeks comment on "whether cable operators should continue to qualify for the cable rate where they offer multiple services in addition to cable service, and whether all telecommunications carriers must pay the telecommunications rate, regardless of what other services they may provide over their attachments."[49] FPL and TECO agree with the Commission's recognition that "the once-clear distinction between 'cable television systems' and 'telecommunications carriers' has blurred as each type of company enters markets for delivery of services historically associated with the other."[50] Under Section 224, telecommunications carriers are required to pay the telecommunications rate regardless of any other services they may offer. If the Commission's goal truly is to level the competitive playing field, any single rate adopted to cover broadband attachments cannot be lower than the existing telecommunications rate. Otherwise, cable television systems which are offering broadband, but are not offering telecom service, would be paying a lower rate than their telecom carrier competitors offering functionally identical services.

The telecom rate itself, though, is not without flaws. In addition to being based on historical (backward-looking) costs, rather than forward-looking costs which typically drive

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48 *See In the Matter of Inguiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, FCC-02-77 (March 15, 2002) (ruling that cable modem service should be classified as an interstate information service, not as a cable service, and that there was no separate offering of telecommunications service); *see also In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Teleph-ony Services are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) (finding that AT&T's phone-to-phone VoIP was a telecommunications service).

49 *NPRM*, ¶ 8.

50 *Id*, ¶5.

market decisions, Section 224(e) arbitrarily "lops off" one-third the cost of providing the common space on a pole.[51] However, given the limitations of Section 224, the telecom rate is the lesser of two evils. Applying the telecom rate to as many attachments as possible will at least bring the regulatory paradigm one step closer to full and fair cost allocation.

C. "Tweaks" To Telecom Rate Presumptions

As the Commission notes in the NPRM, the only difference between the cable formula and telecom formula is the "manner in which the costs associated with the unusable portion of the pole are allocated."[52] Though there are numerous flaws in the Commission's formula for calculating the net cost of a bare pole and the annual carrying charge, FPL and TECO focus these comments on two specific presumptions that impact the space allocation factor of the telecom formula: (1) the presumed feet of common (a/k/a "unusable") space;[53] and (2) the presumed average number of attaching entities.

1. "Common Space" Presumptions

Commission regulations presume 24 feet of common space on the presumed 37.5 foot pole for purposes of implementing the telecom rate.[54] The 24 foot presumption is based on the assumption that 6 feet of a pole are beneath the ground, and 18 feet are above ground to achieve minimum grade clearance. However, the NESC-required Communication Workers Safety Zone

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51 If this 1/3 reduction accounted for the pole owner's share of the common space on a pole, it might make sense. However, the Commission's implementation of the telecom rate also counts the pole owner as an "attaching entity" for purposes of allocating the remaining 2/3 of the common space. In most instances, this results in the pole owner bearing the cost of providing more than 50% of the common space on a pole, while the attacher typically bears between 13% and 22% (5 and 3 attaching entities, respectively), depending on the average number of attaching entities used in the formula (1/5 x 2/3 = 2/15 (13%); 1/3 x 2/3 = 2/9 (22%)) notwithstanding the fact that common space on the pole is of equal benefit to all parties attached. *See* House Report No. 104-204, at 92 (stating that unusable space on a pole "is of equal benefit to all entities attaching to the pole."); House Conf. Rep. No. 104-458, at 206 (same).

52 *NPRM*, ¶ 29.

53 The term "unusable" space is probably a misnomer. This space is in fact needed and used by all attaching entities to obtain proper clearances. Section 224 itself does not use the term "unusable" space, but instead refers to this as "other than the usable space." § 224(e)(2). Congress recognized that this space is of equal benefit to all parties attached to the pole. *House Report No.* 104-204, at 92 (stating that unusable space on a pole "is of equal benefit to all entities attaching to the pole."); *House Conf. Rep. No.* 104-458, at 206 (same).

54 *See* 47 C.F.R. §1.1418

is not included within the Commission's common space presumption. The Communication Workers Safety Zone (sometimes called the "safety space") is 40 inches in most construction configurations.[55] This space between the highest communications line and the lowest electric facility exists for the purpose of protecting communication workers (as the name implies). Though this entire space could fairly be allocated entirely to communications attachers, at a minimum FPL and TECO urge that the Commission include 3 feet of this space (less than the typical 40" safety space) in the presumed "common" or "unusable" space. Though the Commission in prior rulemakings has declined to include the Communications Workers Safety Zone in the common space,[56] the Commission should revisit this issue if it is serious about taking steps to eliminate electric consumers' subsidization of communications attachers.[57]

2. Average Number of Attaching Entities Presumptions

The Commission's current regulations establish the following presumptions: (1) three attaching entities in non-urbanized areas (under 50,000 population); and five attaching entities in urbanized areas.[58] The Commission's regulations provide: "If any part of the utility's service area within the state has a designation of urbanized ... then all of that service area shall be designated as urbanized for purposes of determining the presumptive average number of attaching entities."[59] For FPL and TECO, this means the Commission presumes there are five attaching entities on every distribution pole in their systems. These presumptions do not square with reality.

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55 *See* NESC, 62-2007, Table 238-1

56 *See, e.g., Amendment of Commission's Rules Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 48 (2001).

57 *See, e.g., NPRM*, Statement of Chairman, Kevin J. Martin. ("I do not think electric consumers should be subsidizing broadband companies.")

58 47 C.F.R. § 1.1417(c).

59 *Id.*

The average number of attaching entities in TECO's service territory (which is dense and geographically small) is 2.08 (which includes TECO as an "attaching entity").[60] The average number of attachments per pole (which is higher than the number of attaching entities) in FPL's service territory is just slightly more than 2.[61] Though the Commission's rules allow the pole owner to rebut the presumptions, the Commission (especially for electric utilities with geographically broad or diverse service territories like FPL) requires that the average number of attaching entities be limited to a subset of poles more narrow than the total number of distribution poles.[62] This requires data which can be costly to develop. Further, using a *subset* of distribution poles to calculate the average number of attaching entities creates a disconnect in the formula, insofar as the Commission's formula calculates the net cost of a bare pole and the annual carrying charge based on the *entire* distribution pole population. Poles with multiple third party attachments are generally more expensive to install (because they are taller and stronger) and more expensive to maintain (because they are in more densely populated areas and because the "work around" cost increases with each new attachment).

Because industry data is at odds with the Commission's presumptions, FPL and TECO urge the Commission to revise its presumed average number of attaching entities to no more than 3 attaching entities in urbanized areas. Both pole owners and attachers should maintain the right to rebut this presumption, but any rebuttal should be based on the *entire* pole population (rather than a subset) so it is consistent with the other parts of the formula.

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[60] *See* Angiulli Decl. at ¶ 18.

[61] *See* Kennedy Decl. at ¶ 19.

[62] *See Amendment of Commission's Rules Governing Pole Attachments*, 16 FCC Rcd 12103, ¶¶ 62-72 (2001); *Teleport Communications Atlanta, Inc. Complainant, v. Georgia Power Company*, 17 FCC Rcd 19859, ¶¶ 14-20 (2002).

D. The Single Rate Should Not Apply to Wireless Attachments

The single rate adopted by the Commission for cable television systems and telecommunications carriers providing broadband services should not apply to wireless attachments. The size, shape, construction and burden of wireless attachments are too varied and non-uniform to adopt and implement any uniform formulaic approach.[63]

Furthermore, there has not been a showing of any need for a universal formulaic approach to wireless attachment rates. Private negotiations appear to be working just fine, likely due to the fact that wireless networks are not as dependent on pole infrastructure as wireline networks. Wireless attachers have numerous options, such as buildings, wireless towers, billboards, and virtually any other structure. The policy rational which may support a uniform formulaic approach to wireline attachments simply does not exist for wireless attachments, nor does Section 224 require such an approach.

IV. CONCLUSION

Even if the Commission finds that it has statutory authority to exercise jurisdiction over ILEC attachments on electric utility poles, it should decline to exercise that jurisdiction for the reasons set forth above. FPL and TECO support the Commission's tentative conclusion "that all attachments used for broadband Internet access service should be subject to a single rate," so long as that rate is the telecom rate (with tweaked presumptions) and so long as that rate does not apply to ILECs. FPL and TECO appreciate the opportunity to offer these initial comments and look forward to offering further comments and evidence in reply.

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63 *See* Angiulli Decl. at ¶ 19; Kennedy Decl. at ¶ 21.

Respectfully submitted,

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